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In The

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-677

REEVES, INC.,

Petitioner,

vs.

TOM KELLEY, STAN FRANK, JOHN E. PHELPS, AL SANDVIG and DAVE JOHNSON, members of the South Dakota Cement Commission,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner contends that the Respondents (hereinafter referred to as "South Dakota"), violated the Commerce Clause of the United States Constitution when they withheld sales of State owned and manufactured cement to nonresidents until the needs of South Dakota residents had been met.

In two separate opinions (Pet. Appendix "A" and "C"), the Eighth Circuit Court of Appeals held that the Commerce Clause does not limit the State of South Da-

kota's power to choose whether, to whom, and on what conditions it sells its own manufactured goods, as opposed to those goods placed in the stream of commerce by private citizens.

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QUESTION PRESENTED

1. Does the State of South Dakota violate the Commerce Clause by participating in the market and exercising the right to favor its own citizens over others in the sale of products manufactured and owned by the State?

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STATEMENT

The State Cement Commission was organized in 1919, following passage by the citizens of the State of South Dakota of a constitutional amendment, Article XIII, § 10, declaring that the manufacture, distribution and sale of cement and cement products are "works of public necessity and importance in which the State may engage." (Pet. Appendix "H" p. 26).

During the year 1978 a serious shortage of manufactured cement arose in South Dakota. The public purpose of the Cement Plant, that is, to manufacture and sell cement to the citizens of South Dakota, was recognized by the Commission. This public purpose dictated and prompted the Commission to adopt a policy of fulfilling

the South Dakota demand for cement prior to any out of state sales (Pet. Appendix "E", "F").

The District Court held that this policy violated the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution (Pet. Appendix "D"). The Eighth Circuit Court of Appeals reversed the District Court, holding that the Commerce Clause does not prohibit South Dakota from participating in the market and exercising the right to favor its own citizens over others. *Reeves, et al. v. Kelley, et al.*, 586 F. 2d 1230 (8th Cir. 1978). A Petition for a Writ of Certiorari was filed in the Supreme Court of the United States. The Petition for Writ of Certiorari was granted and the judgment of the Court of Appeals was vacated and the case was remanded for further consideration in light of *Hughes v. Oklahoma*, 441 U. S. —, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979); *Reeves, Inc. v. Kelley*, — U. S. —, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979).

In its opinion on remand, the Eighth Circuit Court of Appeals carefully considered the Supreme Court's decision in *Hughes v. Oklahoma*, supra. The Appeals Court discerned significant differences between the cases. *Hughes v. Oklahoma* dealt with a direct state attempt to restrict the out-of-state sale of a natural resource after it had been reduced to private possession. In contrast, the State of South Dakota made no attempt to regulate or control the private sale of cement. Basing its decision on this fundamental distinction, the Court of Appeals abided by its previous holding that the Commerce Clause does not prohibit South Dakota "from participating in the market and exercising the right to favor its own citizens over others."

Hughes v. Alexandria Scrap Corp., 426 U. S. 810, 96 S. Ct. 2498, 49 L. Ed. 2d 231; *Reeves, Inc. v. Kelley*, 603 F. 2d 736 (8th Cir. 1979).

—o—

REASONS FOR REFUSING THE WRIT

Petitioner argues that the decision of the Court of Appeals should be reviewed because it is not in accord with previous decisions of this Court in the application of the Commerce Clause. In seeking review, the Petitioner claims reliance on "established constitutional principles . . . extending from *Gibbons v. Ogden*, 9 Wheaton 1, 6 L. Ed. 23 (1824) to *Hughes v. Oklahoma*, supra." (Pet. p. 9).

Petitioner's reliance on the constitutional principles controlling these cases proceeds from a fundamental misconception of the difference between a State using its powers to restrict or burden commerce between citizens in interstate commerce and a State entering the marketplace and selling its own manufactured products. In the present case the State of South Dakota makes no attempt to regulate or control the exchange of private articles of trade in interstate commerce. Rather, South Dakota has made a marketing decision in the same manner as any private business has the right to do, to favor its own citizens in the sale of its own product in conformity with the public purpose embodied in the State's constitution (Pet. Appendix "H"). A far different question would have been presented to this Court if the State of South Dakota had enacted legislation prohibiting its citizens from selling

cement to nonresidents. In such a case, the constitutional precedents urged by the Petitioner clearly would be applicable, and such legislation would certainly be found to be the type of burden upon commerce which the Commerce Clause was intended to make suspect.

All of the cases relied upon by the Petitioner address the specific Commerce Clause prohibition that no State shall restrict a private citizen in the marketing of his property. No case relied upon by the Petitioner holds that a state is regulating commerce when it sells its own manufactured product. The Court of Appeals properly decided this case in accord with previous decisions of this Court. The lower court correctly distinguished the cases cited by Petitioner and relied principally upon *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976), concluding that the actions of South Dakota were most similar to Maryland's preference for its own residents in its entry into the scrap market.

In accordance with the directions of this Court, the Court of Appeals considered the decision of this Court in *Hughes v. Oklahoma*, 441 U. S. —, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). The Court of Appeals recognized significant differences between the cases. The dominant issue facing the Supreme Court in *Hughes v. Oklahoma*, supra, was whether or not a State could still lay claim to an ownership interest in wildlife within its borders even after the game had come into private hands. The significance of the case lies in the fact that the Supreme Court abandoned the legal fiction of such state ownership. In the present case there is no issue of ownership. The State

of South Dakota relies on no legal fiction to claim an ownership interest in its own manufactured product. Its ownership of cement is based on simple fact not legal fiction. Similarly, South Dakota has not maintained that through some legal fiction its ownership interest in the cement continues after the product comes into the possession of private parties such that it could restrict its sale to nonresidents. Rather, South Dakota maintains that until the State sells its product, thereby surrendering its ownership interest, the State is free to restrict its own sales in accordance with the legislative mandate of its creation and the Constitution of the State of South Dakota.

The holding of the Supreme Court in *Hughes v. Oklahoma,* supra, is supportive of South Dakota's position in the present case. The precise holding of *Hughes v. Oklahoma* was stated by the Court in the final sentence of the majority opinion, wherein the Court quoted the dissenting opinion of Justice Field in *Geer v. Connecticut,* 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896):

> "*When* any animal, whether living in the waters of the State or in the air above, is lawfully killed for the purpose of food or other uses of man, it *becomes an article of commerce* and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." *Geer v. Connecticut,* supra, 161 U. S. at 538 (Emphasis supplied.)

Thus *Hughes v. Oklahoma* stands for the proposition that *when* a natural resource such as wildlife comes into private hands it then becomes an *article of commerce* and a State may not limit its use to its own citizens to the exclusion of nonresidents. The Court of Appeals' decisions below are entirely consistent with this holding. South Dakota in the exercise of its property rights in its own manufactured products may choose to sell to its own citizens before selling to nonresidents in accordance with the public purpose for which it was created. *When* its product has been sold, however, it becomes an *article of commerce* and the State of South Dakota could not thereafter restrict its movement in interstate commerce.

The Petitioner chooses to entirely ignore the type of state involvement in commerce, and instead maintains that every action of a State that may have an effect on interstate commerce is subject to Commerce Clause review. The Supreme Court expressly rejected this identical argument in *Hughes v. Alexandria Scrap Corp.,* supra:

> This line of reasoning is not without force if its basic premise is accepted. That premise is that every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is potentially an impermissible burden. But we are not persuaded that Maryland's action in amending its statute was the kind of action with which the Commerce Clause is concerned. 426 U. S. at 805, 96 S. Ct. at 2495, 49 L. Ed. 2d at 228-29.

The Supreme Court in *Hughes v. Alexandria Scrap Corp.,* supra, reviewed the same cases relied upon by the Petitioner herein and concluded that "[t]he common thread of all these cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." 426 U. S. at 806, 96 S. Ct. at 2496, 49 L. Ed. 2d at 229. The Court then drew a clear distinction between the historical evils the Commerce Clause was designed to prevent and the type of State action presented in the case then before it:

> But until today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.
>
> We do not believe the Commerce Clause was intended to require independent justification for such action. *Hughes v. Alexandria Scrap Corp.*, 426 U. S. at 808-09, 96 S. Ct. at 2497, 49 L. Ed. 2d at 230-31.

The Appeals Court recognized that *Hughes v. Alexandria,* supra, was the decision most factually analogous to the present case where the State participates in the market as the seller of its own manufactured product. *Reeves, Inc. v. Kelley,* 603 F. 2d 736, 738 (8th Cir. 1979), fn. 3. The State of South Dakota did not enter the cement market in 1919 with a discriminatory motive, but with the sole objective of meeting a critical shortage of cement within the State. *See generally Eakin v. South Dakota Cement Commission,* 44 S. D. 268, 183 N. W. 651 (S. D. 1921); Article XIII, Section 10, South Dakota Constitution; SDCL 5-17-1 (Pet. Appendix "H").

By entering the cement market the State of South Dakota created or substantially enlarged a market for cement that previously did not exist in a fashion similar to Maryland's subsidy of the scrap processing business. Viewed in the perspective of Justice Stevens' concurring opinion in *Hughes v. Alexandria Scrap,* supra, at 426 U. S. 814-17, the State of South Dakota by manufacturing cement for sale in the marketplace is creating new commerce, not restricting existing commerce between private parties. The State of South Dakota acting in a proprietary capacity is subject to the same regulatory restrictions

placed on private businesses acting in a similar capacity. *Perkins v. Lukens Steel Co.,* 310 U. S. 113, 127, 60 S. Ct. 869, 84 L. Ed. 206 (1940); *American Yearbook Co. v. Askew,* 339 F. Supp. 719 (M. D. Fla), *aff'd mem.,* 409 U. S. 904 (1972). If a private business in South Dakota had chosen to produce and market cement, it could not be argued that the Commerce Clause would require such a private concern to sell to nonresidents if it chose not to do so. A decision by a private business not to market its product outside the State of its origin might well have an effect on the market supply of nonresident purchasers just as the temporary marketing decision of South Dakota in 1978 had some effect on the Petitioner herein. Yet the Supreme Court in *Hughes v. Alexandria Scrap,* supra, clearly enunciated the principle that not every action by a State that had the effect of reducing in some manner the flow of goods in interstate commerce creates an impermissible burden on commerce within the meaning of the Commerce Clause. It is only when a State attempts to exercise its governmental powers to regulate or restrict a private business from functioning in commerce, as was attempted by the State in *Hughes v. Oklahoma,* supra, that an impermissible burden on commerce is created under the Commerce Clause.

Finally, Petitioner asserts that the Court of Appeals' decision could lead to disastrous consequences by subordinating the federal free trade unit intended by our Constitution to the entry of States into commercial enterprises. The Petitioner's fears are unfounded. The decision of the Appeals Court does not leave States engaged in proprietary functions immune from Commerce Clause review. The Court of Appeals expressly recognized that

a State engaging in business is subject to the federal power to regulate whether engaged in proprietary or governmental activities. *Reeves, Inc. v. Kelley,* 603 F. 2d 736, 738, fn. 2 (8th Cir. 1979), *citing United States v. California,* 297 U. S. 175, 183-87, 56 S. Ct. 421, 80 L. Ed. 567 (1936). Congress has not elected to regulate commerce in cement. Thus, absent any such congressional action, "[n]othing in the purposes animating from the Commerce Clause forbids a State . . . from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp.,* supra, 426 U. S. at 810, 96 S. Ct. at 2498, 49 L. Ed. 2d at 231.

CONCLUSION

The Court of Appeals correctly held that the Commerce Clause does not limit the State of South Dakota's power to choose whether, to whom, and on what conditions it sells its State owned and manufactured cement. The decision is in accord with the previous decisions of this Court in *Hughes v. Alexandria Scrap Corp.,* supra, and *Hughes v. Oklahoma,* supra.

It is therefore respectfully submitted that the Petition for Certiorari should be denied.

November, 1979.

Respectfully submitted,

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